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Nos. 88-1758; 88-1915

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In the Supreme Court of the United States

OCTOBER TERM, 1988.

ONEIDA INDIAN NATION OF WISCONSIN, ONEIDA OF THE THAMES BAND, AND INDIVIDUAL MEMBERS OF THE ONEIDA INDIAN NATION OF NEW YORK,
PETITIONERS,
THE ONEIDA INDIAN NATION OF NEW YORK,
PETITIONER,
v.
STATE OF NEW YORK AND VARIOUS STATE AGENCIES; TWELVE NEW YORK COUNTIES AND VALENTINE RYAN, INDIVIDUALLY AND AS CLASS REPRESENTATIVES; ST. REGIS PAPER COMPANY, INDIVIDUALLY AND AS CLASS REPRESENTATIVE; GEORGIA PACIFIC COMPANY AS CLASS REPRESENTATIVE; AND NEW YORK STATE ELECTRIC AND GAS CORPORATION,
RESPONDENTS.

JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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STATE OF NEW YORK AND VARIOUS STATE AGENCIES; TWELVE NEW YORK COUNTIES AND VALENTINE RYAN, INDIVIDUALLY AND AS CLASS REPRESENTATIVES; ST. REGIS PAPER COMPANY, INDIVIDUALLY AND AS CLASS REPRESENTATIVE; GEORGIA PACIFIC COMPANY AS CLASS REPRESENTATIVE; AND NEW YORK STATE ELECTRIC AND GAS CORPORATION,
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JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Counterstatement of the Case.

Defendants the State of New York; Twelve New York Counties and Valentine Ryan, individually and as class representatives; St. Regis Paper Company, individually and as class rep-

resentative; Georgia Pacific Company as class representative; and New York State Electric and Gas Corporation, oppose the petitions for a writ of certiorari numbered 88-1758 and 88-1915.

In these combined actions, originally filed in 1978 and 1979, petitioners seek to recover possession of and sovereignty over approximately 6,000,000 acres of land in central New York.[1] The original Oneida Indian tribe sold its rights to this land to New York State over 200 years ago. The sales in question took place by treaties under the authority of the New York Legislature, in 1785 and 1788, before the Constitution became effective and while the Articles of Confederation governed the relationship between the states and the Confederal Congress.

In the District Court and in the Second Circuit, the petitioners claimed that these sales were void, relying primarily on a 1784 Treaty between the Confederal Congress and various Iroquois tribes. They contended that this Confederal Treaty prevented their ancestral tribe from selling its rights to the land without the Confederal Congress' consent. Petitioners advanced this claim although, under the Articles of Confederation, the Confederal Congress did not have the *power* to prevent states from purchasing land within their own borders from Indians, and although the 1784 Treaty of Fort Stanwix contains not one word about preventing *purchases* of land by *anyone*, least of all the co-sovereign states.

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[1] The Court of Appeals described the land in question as "a swath of land in central New York 50 to 60 miles wide, extending from New York's southern border with Pennsylvania to its northern border with Canada." Petition 88-1758, Appendix, at 4 (hereafter "App.").

The Petition in number 88-1758 claims to be filed on behalf of "individual members of the Oneida Indian Nation of New York," as well as the "Oneida Indian Nation of Wisconsin" and the "Oneida of the Thames Band." It is doubtful whether the "individual members of the Oneida Indian Nation of New York" have standing to institute or pursue this claim. *See Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979).

Respondents originally moved to dismiss the cases in 1980, and the District Court granted the motions in 1981. *Oneida Indian Nation of New York* v. *State of New York*, 520 F. Supp. 1278 (N.D.N.Y. 1981). On petitioners' first appeal to the Second Circuit, that court affirmed the dismissal of petitioners' constructive trust and Trade and Intercourse Act claims. *Oneida Indian Nation of New York* v. *State of New York*, 691 F.2d 1070, 1095-1096 (2d Cir. 1982).[2] With respect to petitioners' claims under the Articles, the Treaty of Fort Stanwix and the Proclamation of 1783, however, the Second Circuit remanded the cases to the District Court to conduct an evidentiary hearing to aid the court in construing those ancient documents. *Id.* at 1086, 1095.

On remand, the District Court conducted the mandated evidentiary hearing. It lasted 9 trial days, and generated 1,467 pages of transcript and an even greater amount of documentary evidence. The court heard testimony from 10 of this Country's foremost experts on the Confederal period, concerning the drafting of the documents in question, the prevailing practices of the States and the Confederal government concerning Indian affairs, and the constructions accorded the pertinent documents by significant eighteenth century statesmen and the Oneidas.

After evaluating this extensive evidence, the District Court again ruled that petitioners could not recover as a matter of law. 649 F. Supp. 420 (N.D.N.Y. 1986). The court's Order was accompanied by a 57 page memorandum opinion. App. 53-109.

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[2] In rejecting petitioners' "constructive trust" theory, the Second Circuit also rejected petitioners' "fraud" theory. 691 F.2d at 1096; App. 6. Nevertheless, the petitioners in No. 88-1758 resurrect this word at a number of points in their brief, as if the invocation of the word somehow makes this case more certworthy. It does not. Petitioners' "fraud" theory was correctly rejected by the Second Circuit in 1982. Moreover, respondents note that the lands in question were *purchased* by New York from the Oneidas, and that respondents introduced extensive evidence at the evidentiary hearing of the intensity and fairness of the negotiations.

Petitioners appealed for a second time to the Second Circuit, contending primarily that the District Court had misconstrued the historical evidence presented at the hearing. The appeal was argued to the panel of Judges Newman, Winter and Kearse on June 2, 1987. On October 31, 1988, the circuit court issued its 57 page Opinion affirming the District Court's dismissal across the board.[3] 860 F.2d 1145 (2d Cir. 1988). Essentially, the Circuit Court held that, unlike the allocation of power established by the Constitution, the "legislative right" proviso of Article IX(4) of the Articles of Confederation reserved to the states the power to extinguish Indian title to lands within their borders, and that such a clause had been fundamental to the division of power between the states and Confederal government established under the Articles. The court held that under the Articles it was questionable whether the Confederal Congress had *any* power to prohibit states from extinguishing Indian title to lands within their borders, but in any event the Confederal Congress certainly had not exercised such a power in the Treaty of Fort Stanwix or the Proclamation of 1783. Finally, the court rejected petitioners' argument that some vague power of "external sovereignty" which resided in the Confederal Congress preempted the right of states to extinguish Indian title within their borders.

Reasons the Writ Should Be Denied.

Petitioners now seek writs of certiorari from this Court. Not surprisingly, they offer no arguments that were not fully litigated, considered, and decided against them, both by the District Court and the Court of Appeals. Moreover, the issues peti-

[3] The court obviously had carefully reviewed the District Court record, noting that "detailed examination of [the record] occasioned the delay in issuing this opinion." App. 7.

tioners ask this Court to address either are not likely to recur in any litigation in the federal courts, or otherwise are so arcane or mundane as not to merit this Court's attention. The Articles of Confederation, on which this case turns, have been defunct for over 200 years. The Treaty of Fort Stanwix itself is over 200 years old, and was essentially superseded by the 1794 Treaty of Canandaigua. 7 Stat. 44. This Court ordinarily does not grant certiorari to construe a defunct constitution and an archaic, superseded Treaty;[4] nor do petitioners suggest that the Second Circuit's decision conflicts with decisions of any of the other Courts of Appeals.

Finally, and equally importantly, the Second Circuit's decision is both comprehensive and correct. The court carefully addressed petitioners' complex claims and the voluminous record, and delivered an extraordinarily lucid and sensible opinion. Petitioners have had their opportunity fully and fairly to litigate their claims; those claims have been properly rejected, and there is no substantial reason for this Court to grant further review, thereby continuing to cloud the title to nearly 6,000,000 acres of real estate overwhelmingly owned by innocent New York citizens, companies and eleemosynary and governmental institutions which did not even exist at the time in question.[5]

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[4] Thus, this case is very different from *County of Oneida* v. *Oneida Indian Nation of New York*, 470 U.S. 226 (1985). That case involved land purchased in 1795, after the Constitution became effective and the Trade and Intercourse Act had been enacted. As the Second Circuit recognized, unlike *post*-constitutional land purchases, the entire approach to *pre*-constitutional land purchases is different, and must reflect the radically different division of governmental powers over Indian affairs which prevailed during that period.

[5] Indeed, one can only imagine the political chaos that would ensue if petitioners were to prevail on these claims, and thereafter sought to evict the present landowners and to establish sovereignty over the claim area.

I. This Case Does Not Involve Recurring Issues of Federal Law or Conflicting Decisions Among the Courts of Appeals.

The Second Circuit stated that "[this] appeal is unusual because it requires a federal court, perhaps for the first time, to determine whether actions of a state violated the Articles of Confederation." App. 3.

That statement concisely captures why review of the Second Circuit's decision is unnecessary. First, because this case primarily involves construction of the Articles of Confederation, it does not involve important issues of federal law — in the sense that those issues are likely to recur. This case is, indeed, "unusual." It is not necessary for this Court, particularly given the comprehensiveness of prior proceedings, to address these arcane issues.[6]

Second, in assessing petitioners' claims it cannot be overemphasized that this case is governed by, and must be evaluated in light of, the Articles of Confederation. Only if certain critical facts about the Articles are ignored do petitioners' arguments even begin to make sense.

It is elementary that the Articles and the Constitution are fundamentally different. One was expressly a confederation

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[6] In fact, this case more properly is characterized as involving *confederal* law, not federal law. The fact that this case turns on the Articles led the Second Circuit in its most recent opinion to question the basis for federal jurisdiction for at least some of petitioners' claims. App. 9-11.

The petitioners in No. 88-1758 half-heartedly suggest, Petition at 4 n.3, that the 1788 Treaty between New York State and the Oneidas actually should be considered as a Treaty entered into after the Constitution became effective. This argument was flatly rejected by the Second Circuit in the first appeal, 691 F.2d at 1079 n.6, based upon Chief Justice Marshall's unequivocal opinion for this Court in *Owings* v. *Speed*, 18 U.S. (5 Wheat.) 420 (1820). It is doubtful that the question is properly preserved for this Court's review. In any event, *Owings* squarely holds that the Constitution did not become effective until March 1789, after conclusion of the 1788 Treaty between New York and the Oneidas.

of sovereign states; the other expressly a Constitution established by "the People of the United States, *in order to form a more perfect union . . . .*" *U.S. Const.*, Preamble (emphasis supplied). One was the first attempt at an instrument of government by parties paradoxically joined together to throw off a tyrannical central authority; the other was "an alteration in the first principles and main pillars of the fabric" of the first, *The Federalist No. 15*, to guard against "anarchy, civil war, a perpetual alienation of the states from each other," *The Federalist No. 85*. One failed utterly, after only eight years; the other is now celebrating its 200th.

The Second Circuit highlighted the most important of the differences between the Articles and the Constitution:

> The fundamental structure of the Articles is one of limited delegation of powers to the national government with reservation to the states of all powers not delegated. Article II provides:
>
> > Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.
>
> The Necessary and Proper Clause, which played such a significant part in the shaping of federal powers under the Constitution, *see McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) was absent from the Articles of Confederation.

App. 15.

Both in this Court and the courts below, petitioners have ignored these fundamental differences between the Articles and the Constitution. Again and again, petitioners have grounded

their arguments in cases and governmental theory which spring from the Constitution, which provides the national government with plenary authority over Indian affairs. For this reason, petitioners' arguments, superficially appealing as they may be, are, on deeper examination, historically inaccurate and legally bankrupt. Thus, for example, petitioners argue that the Treaty of Fort Stanwix should be broadly construed to preempt state authority over Indian affairs, based upon cases construing post-constitutional treaties, while ignoring the division of power that prevailed when that Treaty was written.

These cases involve, at base, an assessment of the power of a *state* during the Articles' period. History tells us that under the Articles the presumptions must *favor* state power. The Second Circuit's essential conclusion — that under the Articles the power to extinguish title to Indian lands within state borders resided with the states, and not the Confederal Congress — is in perfect harmony with both the text and the history preceding the adoption of the Articles of Confederation.

II. The Second Circuit Correctly Decided the Issues on Which Petitioners Seek Review, and Those Issues In Any Event Are Not Substantial.

Despite the fact that the issues raised in these cases will necessarily be arcane, petitioners have attempted to construct "questions presented" which have broader application. Petitioners' efforts notwithstanding, none of those issues merits this Court's attention.

A. *The Second Circuit Correctly Determined that the States Had the Power to Extinguish Indian Title to Lands Within Their Borders Pursuant to Article IX(4).*

First, petitioners in No. 88-1915 argue that the Second Circuit misconstrued the Articles of Confederation, thereby de-

priving "the national government [of] its sovereign power over the extinguishment of Indian title" for the few years during which the Articles of Confederation were effective. Petition No. 88-1915, at i, 11-12. The short answer is that this is not a substantial federal question. In any event, as the Second Circuit concluded, the "legislative right" proviso of Article IX(4) was expressly intended to retain the right to extinguish Indian title within state borders for the individual states.

Petitioners' argument that the Second Circuit's opinion creates a 9-year "anomaly" of state authority to extinguish Indian title sandwiched between two periods of national authority is completely misguided. Petition 88-1915, at 11. First, even plaintiffs' expert, Dr. Reginald Horsman, agreed that the power to extinguish land title within state borders resided with the several states from the beginning of the Revolution until adoption of the Articles. The "legislative right" proviso simply retained that power in the States. Second, petitioners' argument again ignores the fundamental differences between the Articles and the Constitution. The Articles *were* "anomalous." They instituted a radically different division of governmental powers from what preceded and succeeded them. The Second Circuit surely did not err by correctly identifying this anomaly, or the consequences for Indian title which flow from it. Petitioners' argument to the contrary proceeds as if the Revolution and the Articles never happened.

Third, in any event issues related to the construction of Article IX(4) do not merit this Court's attention. Petitioners make the unsupported claim that "massive Indian land transactions occurred" between 1781 and 1789, Petition 88-1915, at 7; there is, however, no evidence of such "massive" transactions. These are the only lawsuits which raise these issues.

Lastly, petitioners argue that Article IX(4)'s provision preserving to the states the "legislative right" to extinguish Indian title within state borders is somehow trumped by the doctrine of

external sovereignty adumbrated by this Court in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Petitioners quote a passage from *Curtiss-Wright* which states:

> Since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.

Curtiss-Wright, 299 U.S. at 316. Petitioners reason that "[s]ince the states individually never held power over matters of war and peace, the Articles of Confederation could not limit Congress' external sovereign power in that area." Petition 88-1915, at 18.

Again, the Second Circuit properly rejected this argument; first, because the power to deal with Indian tribes within the boundaries of the states does not involve the powers of "external sovereignty" described in *Curtiss-Wright*, and second, because *Curtiss-Wright* expressly held that the powers of external sovereignty there described, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. at 320. *See* App. 37-38, 40. The powers of external sovereignty could not trump the limitations provided by Article IX(4), any more than they could trump applicable limitations in the United States Constitution.

Moreover, petitioners' argument is an obvious *non sequitur*. It is one thing to say that the states *severally* did not possess external sovereignty; it is quite another to say that the states, sitting as the Confederation, did not have that power. Since, plainly, the states as a Confederation did have complete powers of external sovereignty, they surely were free to delegate those powers as they chose — *even to themselves as individual states*.

That is precisely what was done in Article VI(5), which conferred on the states the power to wage war where the "state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state . . . ." In sum, petitioners' argument that the powers of "external sovereignty" set forth in *Curtiss-Wright* somehow trump the provisions of Article IX(4) is unsupportable.[7]

B. *The Second Circuit Correctly Construed the Treaty of Fort Stanwix and Properly Applied this Court's Rules of Construction for Indian Treaties.*

Next, both sets of petitioners argue that the Second Circuit misconstrued the 1784 Treaty of Fort Stanwix. Petitioners contend that that Treaty was a proper exercise of the Confederal Congress' powers either under Article IX(1) or Article IX(4), and that by the Treaty the Confederal Congress expressly preempted any state authority to extinguish Indian title without the Confederal Congress' consent. In so arguing, petitioners complain that the Second Circuit so seriously disregarded this Court's rules of construction for Indian treaties that this Court should grant certiorari simply to straighten out this portion of the Second Circuit's opinion.

Again, questions concerning the construction of the Treaty of Fort Stanwix are not substantial federal questions. The

[7] The Second Circuit also rejected the argument that New York's purchases were void because they so implicated matters of war and peace that they were impliedly preempted by Article IX(1) or by the Confederal Congress' powers of "external sovereignty." The Second Circuit held that this limited question concerning the relationship between New York's actions and the confederal war and peace powers was non-justiciable. App. 38-39. The decision is correct. Moreover, it involved only a small part of the Second Circuit's decision, and respondents do not understand either petition for certiorari to press such an implied preemption argument.

Treaty was concluded in 1784, and has no practical application today.

The Second Circuit's opinion with respect to these Treaty construction issues once more is comprehensive and persuasive. Article II of the Treaty, upon which the Oneidas rely, states:

> The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

App. 113.

As the Second Circuit stated: "Manifestly this provision does not say in terms that the Oneidas may not sell their lands to New York without the consent of Congress." App. 42. Indeed, this is an understatement; the provision contains no express words of prohibition at all, least of all prohibition of *sales*. And it says nothing at all about states. The prohibition that petitioners seek to imply is accordingly quite extraordinary.

Furthermore, in context it is plain that the Treaty of Fort Stanwix was a peace treaty, not between New York and the Oneidas, but between the Oneidas, the confederal government, and the four hostile Iroquois tribes which had fought on the side of the British during the Revolution. As the Second Circuit ruled, the language in question was intended to confirm to the Oneidas that their lands would not be involuntarily appropriated either by the United States or by the four hostile tribes. App. 43-44. New York State was not represented during the Treaty negotiations.

Despite this language and history, petitioners have argued that Article II of the Treaty was intended to prohibit New York from purchasing Indian lands within its borders without the consent of the Confederal Congress. In crafting this argument,

the Indians relied heavily on what they claimed were standard canons of Indian treaty construction — that ambiguities in Indian treaties are to be resolved in favor of the Indians; that such ambiguities are to be resolved in accordance with the Indians' understanding of the treaties; and that Indian treaties are to be broadly construed to pre-empt state authority. Petitioners claim here that the Second Circuit not only ignored but altered these canons of construction. Petition 88-1758, at 10-11, 17-18; Petition 88-1915, at 19-23.

In fact, the Second Circuit applied each of the canons of construction described above, and reached its conclusion in accordance with those principles. App. 42, 49. The court advanced a number of good reasons for rejecting petitioners' arguments. First, the court was understandably reluctant to read the simple language of Article II of the Treaty as impliedly preempting New York's hard-won authority, established in Article IX(4), over Indian lands within its borders. Second, the court cited this Court's decision in the *United States* v. *Minnesota*, 270 U.S. 181, 209 (1926), which holds that Indian treaties should not be construed to divest states of property rights "unless the purpose so to do be shown in the Treaty with such certainty as to put it beyond reasonable question." Third, the court noted that it was not willing to construe the Treaty "in favor of the Indians," if such a construction required the court to conclude that the Treaty imposed a perpetual limitation on the Indians' ability to alienate their land voluntarily.[8] App. 42-43. And finally, the court canvassed the historical

[8] Petitioners cite *The New York Indians* (*Fellows* v. *Denniston*), 72 U.S. (5 Wall.) 761 (1867), as a case holding that the Treaty of Fort Stanwix imposed limitations on the State of New York. Unlike the *voluntary* purchase and sale at issue here, however, *Fellows* involved an involuntary state tax imposed on Indian lands. Furthermore, *Fellows* simply identifies, without substantive analysis, a number of treaties which are said to limit New York's authority to impose the tax. Most of these Treaties were entered into *after* the Constitution became effective. The *Fellows* Court lumped the Treaty of Fort Stanwix with

record, and determined that preemption of New York's authority to purchase Indian lands was *not* intended. *Id.* at 43-49. The court concluded that Article II of the Treaty "would have to be not merely construed but virtually rewritten" to arrive at the Indians' proposed meaning. *Id.* at 50.

In sum, there is no substantial federal question concerning construction of the Treaty of Fort Stanwix.

C. *The Second Circuit Properly Resolved This Case on Motions to Dismiss.*

Finally, petitioners argue that the Second Circuit improperly resolved issues of fact with regard to the motions to dismiss.

Again, the question whether the Second Circuit properly applied Federal Rules of Civil Procedure 12(b)(6) and 56 under the facts of this case is not an issue which merits a commitment of this Court's "scarce judicial resources." *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). In any event, petitioners' argument is incorrect. Each of the issues decided by the Second Circuit was an issue of law. The principal issues raised by the motions to dismiss and decided by the Second Circuit were (1) whether the Confederal Congress had the power, under the Articles of Confederation or some vague concept of "external sovereignty," to prevent a state from purchasing land from the Indians within its limits, and (2) whether the Confederal Congress exercised that power through the Treaty of Fort Stanwix or the Proclamation of 1783. Each of those questions is a question of law. The first involves construction of the Articles of Confederation; the second involves construction of a Treaty or legislative proclamation. Accordingly, this case properly was decided on motions to dismiss.

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these post-constitutional treaties, without discussing the important distinction as to the time of adoption. This off-hand reference to the Treaty does not undermine the Second Circuit's analysis.

The petitioners' confusion stems from the evidentiary hearing held by the District Court in deciding the motions to dismiss, and the review of the results of that evidentiary hearing by the Court of Appeals. But the evidentiary hearing was held, at the direction of the Second Circuit, merely to marshal and assess extrinsic aids to the construction of the Articles, the Treaty, and the Proclamation — that is, to aid in the determination of questions of law. 691 F.2d at 1086. The procedure may be unusual, but it did not change a question of law into a question of fact. When ruling on motions to dismiss, courts regularly resolve factual arguments concerning the intent of the drafters of statutes, treaties, or constitutions; aside from utilizing an evidentiary hearing to resolve such conflicts concerning 200 year old documents, this case was no different.[9]

Conclusion.

For the past 10 years petitioners' claims in this case have placed a cloud on the title to nearly 6,000,000 acres of real estate, held by innocent residents of the State of New York. Petitioners' claims have been carefully scrutinized on two occasions by both the District Court and the Court of Appeals. A comprehensive trial-type evidentiary hearing was held, at the instance of petitioners, to aid the construction of the ancient documents at issue. At each turn, petitioners' claims have been

[9] Incredibly, petitioners in 88-1758 seem to suggest that still further factual development is necessary, calling the prior proceeding "truncated." Petition 88-1758 at 22-23. The massive evidentiary undertaking already concluded is sufficient to resolve legal issues concerning the construction of the Articles, the Treaty and the Proclamation.

found wanting. It is time for this litigation to end. The petitions present no recurring or substantial issues of federal law which merit this Court's attention.

Respectfully submitted,

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